SUPREME COURT, U. S.
MAY 5 1967
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No. ~~1367~~ 1324

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HOMER PHILLIPS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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To the Honorable, The Chief Justice, and the Associate Justices of The Supreme Court of The United States.

Petitioner, Homer Phillips, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, Mr. Justice Kiley dissenting, which affirmed the District Court's judgment and sentence of ten years imprisonment for a violation of Title 21, Section 174, United States Code.

OPINION BELOW

No opinion was rendered in the United States District Court for the Northern District of Illinois, Eastern Division. The opinion of the United States Court of Appeals is unreported and is set forth in the appendix hereto, Appendix A, majority opinion pages 1a-9a, dissenting opinion, pages 9a-18a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 7, 1967. The Petition for Rehearing was denied, without opinion, on April 5, 1967.

The jurisdiction of this Court is invoked under Title 28, Section 1254, United States Code, 62 Stat. 928.

QUESTIONS PRESENTED

1. Where, on the trial of a one count indictment for the concealment of a narcotic drug seized from a dwelling at three o'clock in the afternoon in execution of a search warrant, does not the admission into evidence of the uncharged offenses of petitioner's dispensing of a package to petitioner's brother, twelve hours previously in a public tavern, petitioner's brother's subsequent flight in an automobile from the agents, the brother's running from the agents, his discarding of narcotics and the agents' arrest of petitioner's brother and retrieving of the discarded narcotics, violate petitioner's constitutional rights to due process of law and to be informed of the nature and cause of the accusation against petitioner?

2. Where the trial court summarily denies a pretrial petition to suppress evidence, without prejudice, was petitioner obligated to again renew the petition during the trial to avoid a waiver of his rights thereunder?

3. Does the affidavit in the case at bar set forth facts which establish probable cause for the issuance of a search warrant?

4. Where petitioner first denied possession of narcotics and then admitted its possession for the stated reason that he did not want his girlfriend, in whose apartment and presence the drugs were found, to go to jail, is not such a confession inherently involuntary and did not its admission into evidence violate petitioner's Fifth Amendment constitutional rights against self incrimination and of due process?

5. Did not the Government witness-agent's testimony that petitioner told him that he would not sign a statement because he did not want to go back to jail, and the juror's comment thereon to the agent while he was still in the witness chair violate petitioner's constitutional rights to a fair trial and due process of law?

CONSTITUTIONAL PROVISION, RULE AND STATUTE INVOLVED

The Fourth, Fifth and Sixth Amendments to the United States Constitution, Rule 41 (e) of the Federal Rules of Criminal Procedure and Title 21, Section 174, United States Code are involved herein and are set forth in Appendix B, pages 19a-21a.

STATEMENT OF CASE

The one count indictment charged petitioner, Homer Phillips, and the co-defendant, Melsia Ruth Delaney, with the unlawful concealment of a narcotic drug, heroin, on April 24, 1964 at Chicago, Illinois, in violation of Title 21, Section 174, United States Code. The narcotics, which the indictment charged the defendants with having con-

cealed, were seized in Delaney's presence by Federal Narcotic agents, in execution of a search warrant, from a telephone book in her first floor apartment at 8004 South Yale Street, Chicago, Illinois at approximately 3:00 P.M. on April 24, 1964. Petitioner was not in the apartment when the narcotics were seized. He was arrested several days later, on April 27, 1964, at his place of employment, (A. 63-64).[1]

Almost six (6) months prior to trial, defendant Delaney filed a petition to quash the search warrant and suppress the seized narcotics as evidence, (A. 6-12). The trial court summarily denied said petition without holding a hearing or taking evidence and without prejudice, (A. 12). One week thereafter, on June 4, 1965, and also prior to trial, so that petitioner could rely upon the constitutional invalidity of the search warrant and the seizure and to avoid any waiver of his rights thereunder, petitioner filed his motion to join in and adopt the Delaney petition to quash the search warrant and suppress evidence, (A. 12-14). Petitioner's motion to join in and adopt was allowed, (A. 12).

The trial commenced on November 9, 1965. In his opening statement to the jury, the Assistant United States Attorney stated that he expected the evidence to show the agents' seizure of narcotic drugs from the 1st floor apartment at 8004 South Yale Avenue at Chicago, Illinois on April 24, 1964 at about 3:00 P.M., (A. 36). The Prosecuting Attorney further stated to the jury that he expected the evidence to show that at about 2:00 A.M., some twelve hours before the agents' discovery of the narcotics in the premises, the agents observed Petitioner enter and followed him when he left the premises. Petitioner's coun-

[1] (A. 63-64) indicate the pages of the Appendix to the record filed on appeal and submitted herewith.

sel objected to this phase of the Prosecuting Attorney's opening statement and out of the hearing of the jury stated to the court, (A. 37):

> "Mr. Pincham: • • • I anticipate he is now getting into an area which is highly inflammatory, highly objectionable and certainly would be inadmissible in the trial of this case. The question here is, did these defendants or did my client have these narcotics hid in his possession on the date and time in question. Now, I think I am justified in surmising from the search warrant, from what is stated in the search warrant, that he proposes to show this jury what is alleged in the search warrant as the basis for getting the search warrant, that the agents saw him leave and go into a tavern and saw him hand a man a package and then later they arrested one of these men who had narcotics. That would be inadmissible on the trial of this case."

Defense counsel urged that the facts set forth in the affidavit for the search warrant, as a basis for the issuance of the search warrant, were inadmissible on the trial for the subsequent concealment of the drugs seized in the execution of the warrant, and again pointed out to the court the factual allegations and contents of the affidavit for the search warrant. (A. 37-38). The Government attorney responded, (A. 39):

> "Mr. Plunkett: • • • We are only asking the jury to draw an inference, • • •"

The Court ruled, (A. 39):

> "The Court: • • • You have a right to show the propensity of the defendant to have committed the crime of possession by showing evidence of possession within a reasonable time prior thereto and thereafter."

Defense counsel thereupon responded and urged, (A. 39):

> "We didn't come here anticipating defending the allegations of a search warrant, and this is what they are asking us to do * * *."

Finally, the Court ruled, (A. 39):

> "The Court: I don't think at this stage I should face it at all, my only question of the prosecution is, do you expect this to be connected up? If you say yes, I am going to go ahead."

Over defense counsel's vigorous objections, Federal Narcotic Agents Hill and Pringle, testified, (A. 40-42, 56-57, 59-62), that on April 24, 1964 at approximately 2:00 A.M., they observed Petitioner drive to and stop on Yale Avenue, enter 8004 S. Yale and exit about ten minutes later; Petitioner entered his car and drove to and parked in the 7100 block on Halsted Street; he entered the New Waikiki Lounge at 7112 S. Halsted; as Agent Hill walked past the tavern, through the front window he observed Petitioner hand Tommie Phillips an aluminum foil package, which Tommie "appeared to put in his pocket," (A. 41); Tommie and Johnny Littleton drove from the tavern, followed by Agents Hill and Pringle; in the 4100 block on South Federal, these agents curbed Tommie and Littleton's car, and identified themselves as Federal agents; Tommie jumped out of the car and ran through a Chicago Housing project; Agent Hill chased him on foot through alleys and down various streets, and as he did so, Agent Hill observed Tommie throw an aluminum foil package over a fence which surrounded a school; Agent Hill continued the chase and apprehended Tommie at the end of an alley. Agent Hill returned Tommie to the car, where Agent Pringle was waiting with Littleton, the driver; Agent Hill returned to where he saw Tommie

throw the package, Hill climbed the fence and recovered an aluminum foil package which contained a white powder; Agent Hill returned to the car and he and Agent Pringle took Tommie and Littleton to the Narcotic Bureau Office, where Agent Pringle performed a Marquis reagent on the white powder which was contained in this aluminum package, (A. 42).

Agents Hill and Pringle further testified that they thereafter, about 3:00 P.M. on April 24, 1964, in execution of a search warrant, seized a narcotic drug from a telephone directory in the living room of the first floor apartment at 8004 South Yale Avenue in the presence of defendant Delaney. As before stated, it was these narcotics that the indictment alleged the defendants to have concealed and for which they were on trial. Agents Pringle, Prziborowski and Hill arrested Petitioner on April 27, 1964 at the place of his employment at Ogden and Kedzie, Chicago.

At the conclusion of Agent Hill's direct examination, defense counsel moved the Court to declare a mistrial, or in the alternative strike Agent Hill's testimony of the Tommie Phillips' episode and instruct the jury to disregard it, (A. 46-50). Defense counsel urged, (A. 46, 47):

> "• • • We don't convict people by association, that we don't convict people by relationship. • • • We didn't come down here to meet that. • • • The issue in this case is simple: Did this defendant conceal a narcotic drug in the premises at 8004 S. Yale on the date in question? There is no case that authorizes this. • • • if that is not guilt by association, if that is not guilt by relationship, I suggest I can't think of a better example. • • • "We indict you for 120-something grams of narcotic drugs found at 8004 S. Yale Avenue, but when we bring you down here for trial, we are also going to try you for dispensing a narcotic drug to Tommie Phillips, under

the guise of proving what is in the indictment. We are also going to try you for Tommie Phillips running from an agent and throwing a package over the fence." * * * We can't overcome that Judge. * * * We are put to the impossible task of defending one brother as against another brother. * * * Judge, it is unfair. As this case now stands, we are put to the responsibility and to the task of defending against immaterial, irrelevant, prejudicial testimony not by either one of these defendants but by another person who is not before the bar, who we can't cross examine, who is not on trial. * * * We come here to meet what was seized in that house on the afternoon of April the 24th 1964, pursuant to a search warrant. * * *"

The trial court stated, (A. 50):

"The Court: Well, the case is just underway. I am going to deny the motion to withdraw a juror. Insofar as the incident with relation to a Tommie Phillips is concerned, I am going to allow the motion. I will instruct the jury to disregard any such testimony as evidence heretofore admitted which appeared to indicate that the defendant Homer Phillips on or before the date of the charge here passed a package to a man who the witness stated was the defendant's brother, who in turn drove to another location, jumped out of the car and fled and dropped the package and threw away the package, which package was picked up by the agent and later found to be narcotics, and to cast it out of the jury's mind, disregard it completely.

* * *

"I do this out of an abundance of caution and out of agreement with Mr. Pincham that it has become an erroneous admission into evidence of matters which are totally unnecessary to the establishment of the government's case and totally irrelevant and cannot on their face be admitted without the inferences to be drawn therefrom which are not capable of being drawn.

The Government attorney thereupon argued the admissibility of the Tommie Phillips' episodes, and concluded, (A. 50):

> "Mr. Plunkett: We are trying to prove Tommie Lee Phillips had narcotics which he obtained from Homer Phillips, that is all. • • •"

The trial Court reversed itself and denied the defense motion to strike the agents' testimony of the Tommie Lee Phillips' episodes and instruct the jury to disregard it, (A. 51, 52). Agent Pringle was then called as a Government witness and he too related these Tommie Phillips' episodes to the jury. Defense counsel's motions, at the close of the Government's case and the close of all the evidence, to strike the agents' testimony of the Tommie Phillips' episodes were denied, (A. 81, 89).

In her own behalf, defendant Delaney testified to the agents forcible entry into her apartment, without announcing their office or authority, their seizure of the package which contained the drugs and her lack of knowledge of the drug's presence in her apartment, (A. 82-85). Petitioner offered no evidence. The jury found Delaney and Petitioner guilty.

The Court subsequently granted defendant Delaney's motion for a new trial, stating, (A. 103):

> "• • • it is very difficult for me to feel the certainty with which the jury could have seen the knowledge on her part just from the fact that an agent picked up a telephone book and then she turns around and he says, 'I found this in the telephone book' • • • I don't believe that the jury had a clear basis upon which to find against her and I am going to allow her a new trial on your motion • • • I will proceed with sentencing Homer Phillips at this time."

Petitioner was sentenced to ten years imprisonment. Defendant Delaney was subsequently placed on probation on her plea of guilty to a lesser offense.

ARGUMENT AND REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

CONFLICTS EXIST BETWEEN AND EVEN WITHIN THE UNITED STATES COURTS OF APPEALS ON THE ADMISSIBILITY OF EVIDENCE OF CRIMES NOT CHARGED IN THE INDICTMENT.

The dissenting opinion of Mr. Justice Kiley in the instant case, Appendix A, pages 10a-18a, dramatically expresses the conflict of the majority's holding of the admissibility of the Tommie Phillips' episode as evidence against Petitioner with the contrary holdings of the United States Courts of Appeals for the Ninth Circuit, in *Enriquez* v. *U.S.*, 314 Fed. (2) 703, 716, for the Seventh Circuit, in *Magee* v. *U.S.*, 261 Fed. (2) 609, and for the Second Circuit, in *Smith* v. *U.S.*, 283 Fed. (2) 760. But moreover, the majority's holding here directly conflicts and cannot be reconciled with the holding of this Court in *Boyd* v. *U.S.*, 142 U.S. 450, 35 L. Ed. 1077. In *Boyd*, the defendants were convicted of the murder of Dansby. On the trial, the Government's evidence not only established that the defendants committed the murder, but also that the defendants had committed several robberies. This Court pointed out that "in relation to these [robbery] matters, the witnesses went into details as fully as if the defendant had been put upon trial for the robberies they were, respectively, charged by the evidence with having committed." In the case at bar, the Government witnesses went into details of the Tommie Lee Phillips' episodes more fully than the offense charged and just as fully as if Petitioner had been charged with it and was on trial therefor. As Mr. Justice Kiley's dissenting opinion points out, Appendix A, Pages 15a, ". . .. its dramatic impact, must have confused the jury. This was

not only the most interesting story in the government's case, it was the first one told." In *Boyd*, in an attempt to justify the admission of the robbery episodes into evidence on the trial of the murder, the government argued that such evidence was admissible to establish the defendants' identification and intent. 35 L. Ed. 1078-1079. The trial judge instructed the jury that the robbery evidence could be considered by it in passing upon the question of the defendants' identity. In reversing the judgment of conviction, this Court held, 35 L. Ed. 1077, P. 1080:

> "But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. *They were collateral to the issues to be tried. No notice was given by the indictment of the purpose of the Government to introduce proof of them.* They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. *Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.* Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. *However depraved in character, and however full of crime their*

past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged." (Italics added).

In the case at bar, the Tommie Lee Phillips' episodes "were collateral to the issue to be tried"; and "no notice was given by the indictment of the purpose of the Government to introduce proof of them." It prejudiced petitioner with the jurors and drew the jurors' minds away from the real issue. It tended only to prove to the jury that petitioner was a wretch whose life was of no value to the community. In the case at bar, as in *Boyd*, petitioner was "entitled to the full benefits of the rules prescribed by law for the trial of human beings charged with crime." Petitioner, as were the defendants in *Boyd*, "was entitled to be tried upon competent evidence, and only for the offense charged." 35 L. Ed. 1080.

In *U.S.* v. *Magee*, 261 Fed. (2) 609, the Court of Appeals for the Seventh Circuit itself relied upon and quoted from the aforementioned holding of this Court in *Boyd* and reversed. The majority holding in the case at bar that the Tommie Phillips' episode was admissible against petitioner is diametrically opposed to that Court's own previous holding in *Magee*. It likewise conflicts with the holdings in *Bowie* v. *U.S.*, (9th Cir.), 345 Fed. (2) 605; P. 609; *Hansford* v. *U.S.*, (Dist. of C. Cir.), 303 Fed. (2) 219; *Lambert* v. *U.S.*, (5th Cir.), 101 Fed. (2) 960; *Kraft* v. *U.S.*, (8th Cir.), 238 Fed. (2) 794; *Kempe* v. *U.S.*, (8th Cir.), 151 Fed. (2) 680, 686, 687, 689, 690, and *Massei* v. *U.S.*, (1st Cir.), 241 Fed. (2) 895, 902.

Mr. Justice Kiley's dissenting opinion in the case at bar succinctly expresses the basis for the inadmissibility of the Tommie Phillips' episode. As Mr. Justice Kiley aptly concluded, "Due process required that the jury try Homer Phillips on the crime charged." (Appendix A, page 18a.) The admission of this evidence of the un-

charged offenses likewise effectively abrogated petitioner's Sixth Amendment constitutional right "to be informed of the nature and cause of the accusation." Petitioner was taken by surprise and unprepared to defend against it. Because of the surprise admission of the evidence of these uncharged offenses, petitioner was also denied his Sixth Amendment constitutional right "to have compulsory process for obtaining witnesses in his favor" to refute it. Because the jury was permitted to predicate their finding of Petitioner's guilt on evidence of the acts of Tommie Phillips, who the Government did not call as a witness and who petitioner could not cross examine, petitioner was denied his Sixth Amendment constitutional right "to be confronted with the witnesses against him."

The trial court did not instruct the jury on the legal efficacy of the Tommie Phillips' evidence, even though the trial court stated during the trial, (A. 69):

> "The Court: I retain concern about the fact that the jury may be confused as to what drugs are the subject matter of this indictment. This is a concern to me. I will handle that in due course of time."

But the trial court failed to rectify its concern for the jury's confusion "as to what drugs are the subject matter of this indictment", and did not resolve and clarify the jury's confusion, as he stated he would do. The trial Court did not instruct the jury that the Petitioner was not charged in the indictment and was not on trial for the commission of the Tommie Lee Phillips' transactions. The Court did not instruct the jury as to what offense the Petitioner was charged with having committed, or that the indictment charged petitioner with the concealment of the narcotic drugs seized from 8004 S. Yale Avenue on the afternoon of April 24, 1964. For these reasons the defendants objected to the Court's charge to the jury, (A. 97), which objections were overruled, (A. 98). The

jury was compelled to conject and speculate as to whether petitioner was charged with and on trial for the Tommie Phillips' narcotics transactions or the concealment of the narcotics seized from the first floor apartment at 8004 S. Yale Avenue, and remained in that same state of confusion with which the trial court was expressly concerned. The jury was allowed, and indeed required, to hazard and surmise that petitioner was charged with the commission of both. Having heard evidence of the commission of these several separate offenses and not having been instructed as to which of these offenses the indictment charged, the jury's verdict finding petitioner guilty in manner and form as charged in the indictment is at best a sheer guess. The jury could not and did not understandingly or informatively return a verdict.

The trial court's charge, set forth in the Court of Appeals majority opinion, Appendix A, page 7a, that the indictment charged the crime of concealment and possession of narcotics and that it was the jury's decision whether the government had proven guilt beyond a reasonable doubt, was completely inadequate to apprise the jury that Petitioner was charged with the 8004 S. Yale narcotic concealment and not the Tommie Phillips' episodes. This charge likewise did not apprise the jury of the legal effect of the Tommie Phillips' incidents. As Mr. Justice Kiley's dissent quite accurately points out, this charge was equally "broad enough to apply to both sets of facts."—the 8004 S. Yale narcotic concealment as well as the Tommie Phillips' episode. (Appendix A, p. 16a.)

From a mere cursory examination of the colloquy on the settling of the instructions, set forth at Appendix C, pages 22a-25a it is patently obvious that defense counsel requested an instruction on the legal efficacy of the

Tommie Phillips' transaction, and that the trial court's failure to so instruct and was not due to defense counsel's failure to request such an instruction as the majority opinion erroneously suggests. As Mr. Justice Kiley's dissenting opinion correctly points out, the trial court's failure to charge as requested by defense counsel was due to the trial court's expressed decision not to give "the instruction suggested by the defense" and because the trial court did not want to instruct "upon the facts of the case." The trial court further stated that such an instruction was "unnecessary." (Appendix C, p. 24a.)

There was no evidence that the Tommie Phillips' package contained a narcotic drug. The agent testified that he submitted the package to the U.S. Chemist. The Chemist testified that he examined "a" package submitted to him by the agent and that its contents, which he destroyed, was a narcotic drug. The Chemist did not testify, and there is no evidence in the entire record, that the package which he examined and about which he testified was the Tommie Phillips' package submitted to him by the agent. The majority holding of the Court of Appeals in the case at bar notwithstanding, the jury's verdict cannot give legal viability to such an evidentiary deficiency.

The majority holding in the case at bar, Appendix A, page 6a, that, "Without objection, the District Court's instructions concluded that both intent and knowledge are ingredients of this crime", is manifestly erroneous. An examination of the colloquy on the settling of the instructions, conspicuously reveals that defense counsel vigorously objected to this instruction, Appendix C, page 22a. The trial court first ruled that it would refuse this instruction, Appendix C, page 22a, then reversed itself and stated that it would give it, Appendix C, page 24a. Appendix C further reveals that defense counsel again

objected to this instruction immediately after it was given to the jury.

Even assuming that intent and knowledge are essential ingredients of the offense charged, *Morrissette* v. *U.S.*, 342 U.S. 246, upon which the majority of the Court of Appeals relied, is no authority for the admission of the Tommy Phillips' episode. In *Morrissette*, the defendant testified that he had no intention to steal metal casings from a bombing range, and that he thought that the casings had been abandoned. This Court held that it was error for the trial court to refuse to permit the defense counsel to argue the lack of the defendant's intent to commit a theft. In the case at bar, petitioner did not testify and did not put in issue his intent or knowledge. And under the offense charged, Title 21, Section 174, evidence of possession, which possession can be constructive as well as actual, is sufficient "to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." The statute so states. Inasmuch as petitioner offered no explanation of his possession his knowledge and intent was not in issue. Again, as forcible stated in Mr Justice Kiley's Dissent, Appendix A, Page 13a, "Moreover there was no substantial issue of intent. . . . A different question would be presented if the defendant had specifically raised the issue of knowledge and intent. . . . But, in fact, the Defendant did not take the stand or offer other evidence on this issue," or on any other issue, Petitioner presented no evidence. Evidence of the Tommy Lee Phillips' episode was inadmissible and *Morrissette* does not authorize its admission.

Defense counsel's knowledge of the alleged Tommy Lee Phillips' episode was gleaned solely from the affidavit for the search warrant, which had been reviewed and studied by him in preparation of the motion and petition to quash the search warrant. Quite naturally, the prose-

cutor's reference to the facts contained therein in his opening statement triggered defense counsel's objections thereto, and defense counsel was indeed surprised at the prosecutor's intent to introduce it. Defense counsel expressed his surprise in objecting to the prosecutor's opening statement, (A. 39). This surprise precluded the presentation of a defense against the evidence of the uncharged offenses. Petitioner was not tried in accordance with the Constitution and laws of the land.

II.

AN INTER-CIRCUIT CONFLICT EXISTS IN THE INTERPRETATION OF THE REQUIREMENT OF A HEARING ON A MOTION TO SUPPRESS EVIDENCE UNDER RULE 41 (e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The trial court summarily denied the petition to quash the search warrant and to suppress the evidence, without holding a hearing or receiving evidence. The court did not reserve ruling on the petition. The motion was denied "without prejudice" against renewing it. The petition alleged, among other things, that the agents "with force and arms, illegally, forcibly, broke and entered into and upon Petitioner's aforesaid residence and home", (A. 7), "that the search warrant was illegally and improperly executed," (A. 9), and, that "the agents' entry upon petitioner's premises," were in violation of petitioner's constitutional rights, (A. 10). The petition prayed, (A. 11-12), that the affidavit and warrant be quashed, that the narcotics seized from the apartment be suppressed and that the agents be enjoined from testifying concerning said seizure as evidence against Petitioner. These allegations raised a factual issue and under the provisions of Rule 41 (e) of the Federal Rules of Criminal Procedure the trial court was required to "receive evidence on this

issue." The pertinent provision of the Rule provides that where the ground relied upon for suppression of evidence is that the warrant was illegally executed, *"the trial court shall receive evidence on the issue of fact necessary to the decision of the motion."* (Italics ours).

Almost six months after the trial court summarily denied the petition to quash the search warrant and suppress evidence, without prejudice, the cause came on for trial. On the trial defendant—Delaney testified that the agents forcibly broke and entered into her apartment without any prior notice, warning, pronouncement or announcement by them, (A. 84). Such entry was illegal. *Miller* v. *U.S.*, 357 U.S. 301; *Wong Son* v. *U.S.*, 371 U.S. 471; and *Woods* v. *U.S.*, 240 Fed. (2) 37. Because the manner in which the agents executed the search warrant and their failure to announce their office and authority and the purpose for which they sought admission into the apartment was not an issue on the trial, although the trial evidence thereon was conflicting, neither party pursued or developed this issue on the trial. This controverted factual issue was a law question which the Court should have determined on a hearing on the pre-trial motions, which the Rule required the Court to do.

In *U.S.* v. *Jones*, 362 U.S. 257, 4 L. Ed. (2) 697, 709, 86 S. Ct. 725, the officers in execution of a search warrant searched an apartment in which the defendant was present and found narcotics. Defendant's motion to suppress, filed prior to trial, was denied on the basis of his lack of standing. On the hearing of the motion there was a direct conflict between the defendants' and the agents' testimony on the method of execution of the warrant. In reversing on other grounds, this Court said, on the question of the illegal execution of the warrant, at page 709:

> "The trial revealed a direct conflict in the testimony on this matter. We cannot yield to the government's

> suggestion that we ignore that conflict and consider the question on the version of the warrant's execution given at the trial most favorable to the prosecution."

One of the grounds relied upon by Petitioner in his post-trial motions was that the trial court erred in summarily denying Petitioner's pre-trial petition to quash the search warrant and suppress evidence without a hearing thereon, (A. 25). The trial court then took the position that it heard the petition to quash the search warrant and suppress evidence with the trial of the case, (A. 98). Both defense counsel advised the trial court that neither was aware of nor advised that the Court was so doing, (A. 99). The Government at this time orally took the position that the trial court was hearing the motions with the trial, (A. 99). However, the Government thereafter abandoned this position in the Government's written answer to Petitioner's post-trial motions, (A. 29-30), and took the position that Petitioner had waived a hearing on the motion.

The trial court may very well have been hearing the motion along with the trial. However, if that be so, it was the Court's obligation to clearly state this fact so that the defense could govern itself accordingly. The Court did not advise or inform the defense of this fact until the case was over. Petitioner was thus effectively, though undoubtedly, unintentionally prevented from presenting evidence on the factual question involved. The Court's inadvertent omission to inform counsel thus compounded the original error of failing to hold a hearing.

The Court of Appeals held that Petitioner waived his right to a hearing on the motion to quash and suppress by not renewing it during the trial. This holding is diametrically opposed to the trial court's holding. The trial court held that it heard the motion along with the trial

of the case. If this be so, then how could Petitioner have waived a hearing thereon, as the Court of Appeals holds? On the other hand, if Petitioner waived hearing thereon, then how could the trial court have heard the motion along with the trial of the cause, as the trial court held it did. These divergent holdings by the upper and lower courts have bound Petitioner in a vice from which he cannot extricate himself to get a hearing on his motion, nor appellate review of the trial court's ruling thereon.

The Court of Appeals holding in the case at bar that it was incumbent upon Petitioner to renew his motion to quash and suppress during the trial and that Petitioner waived it by not so doing is in direct conflict with the holding of the United States Court of Appeals for the District of Columbia in *Waldron* v. *U.S.*, 219 Fed.(2) 37.

In *Waldron*, the trial court overruled the defendants' pre-trial motion to suppress evidence. The Government contended on appeal that the defendant waived the point because of his failure to renew his motion during the trial. The Court of Appeals held otherwise, 219 Fed.(2) 37, pp. 40-41:

> "That Rule (41(e)) provides that a motion to suppress as evidence illegally seized property 'shall be made before trial * * * but the court in its discretion may entertain the motion at the trial.' The basic purpose of the rule is to prevent, so far as possible, the delay and attendant confusion resulting from attacks during a trial on the admissibility of illegally seized evidence; a trial would have to be interrupted and the jury recessed while the court heard the motion to suppress.
>
> "It seems clear to us that a ruling on a motion to suppress evidence becomes a controlling rule in the case just as does a ruling made during a trial. *A litigant is not required*—indeed he may possibly not be permitted—*to renew contentions upon which the*

court has ruled. Once the court has disposed of a point concerning the admission or exclusion of evidence, litigants must proceed to try the case accordingly. *Of course a trial court may reverse itself on a point during trial, but that possibility does not create an obligation on the part of counsel constantly to renew their contentions.*

"It seems to us the same elementary principles must apply when a motion to suppress has been made under Rule 41(e) and denied by the court. . . . *Tho movant has a right to renew his point; it would be safer and more skillful to interpose an objection when the evidence is offered; but we think he is not required to do so. He does not waive it and is not barred from pressing it upon appeal, if he merely abides the court's ruling and tries the remainder of his case accordingly.* To hold otherwise would be to inject a pure technicality, without a purpose, into the conduct of trials, requiring counsel to repeat a contention already disposed of in the proceeding; and this in respect to a waiver of a constitutional right. *The fact that the court might in its discretion entertain a motion to suppress during the trial does not make it obligatory upon parties to renew such motions during trial or to object in any other way to the evidence at the trial.*" (Italics added).

Mr. Justice Learned Hand, in *Keen* v. *Overseas Tankship Corp.*, 194 Fed.(2) 515, p. 519, for the Second Circuit, stated:

"Moreover, the plaintiff's failure later to repeat the objection, or to conform literally to Rule 51, was not a 'waiver' of the ruling against him (citing cases); he had taken his position, had lost, and he was free thereafter to win a verdict if he could within the narrower borders of the case that the judge had laid down for him. *Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided. The notion is wholly untenable*

> *that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again.*" (Italics added)

We respectfully submit that the Court of Appeals' reliance upon *Di Bello* v. *U.S.*, 369 U.S. 121, 129-130, note 9, 7 L. Ed. (2) 614, as authority for the proposition that it was incumbent upon Petitioner to renew the motion, denied prior to trial, is misplaced. This Court in *Di Bello* merely held that a trial court ruling on a motion to suppress is not an appealable error. Footnote 9 in *Di Bello* merely recites that the trial court may reserve ruling on the motion or hear the motion on the trial. With this we certainly have no quarrel. The question here is, must a defendant renew such motion during the trial when the trial court has already denied it? The question here is, whether or not the trial court's failure to inform petitioner that he is hearing the motion along with the trial of the case constitute a waiver by petitioner when he does not reassert the previously denied motion? *Di Bello* does not answer either question. Nor does *Cheng Wai* v. *U.S.*, 125 Fed. (2) 915, upon which the Court of Appeals also erroneously relies. *Cheng Wai* expressly states that,

> "• • • the proceeding to suppress evidence • • • is an independent proceeding and the order made thereon is appealable." 125 Fed. (2) 915, 916.

This is no longer the law under the abovementioned decision of this Court in *Di Bello.*

Morton v. *U.S.*, 147 Fed. (2) 28, P. 30, note 4; *U.S.* v. *Chieppa*, 241 Fed. (2) 635, pp. 637-638; and *Butler* v. *U.S.*, 153 Fed. (2) 993, 994,[2] upon which the Court of

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[2] The Silver Platter Doctrine, expressed in *Butler*, was overruled in *Elkins* v. *U.S.*, 364 U.S. 206, 4 L. Ed. (2) 1669, 80 S. Ct. 1437.

Appeals relies, are inapplicable here. Each of these authorities merely stand for the proposition that a motion to suppress evidence cannot be made for the first time during the trial of the cause "because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence." Petitioner's motion to quash and suppress, made long before trial, was certainly timely made. Petitioner has not had a hearing on his petition to quash and suppress. If he has, the Court of Appeals has not reviewed it and the waiver holding is in direct conflict with *Waldron* and unsupported by authority.

III.

THE HOLDING OF THE COURT OF APPEALS THAT THE AFFIDAVIT IN THE CASE AT BAR SETS FORTH FACTS WHICH ESTABLISHED PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT CONFLICTS WITH THIS COURT'S HOLDING IN VENTRESCA.

The affidavit for the search warrant did not set forth facts which established probable cause for the issuance of a search warrant. The trial court erred in not quashing the search warrant and suppressing the evidence under the provisions of Rule 41 (e) (2) and (4) of the Federal Rules of Criminal Procedure and Petitioner's Fourth Amendment constitutional rights.

The Court of Appeals left forever buried in the Court's archives the specific language of the affidavit. The majority opinion summary of the affidavit's contents is factually abundantly generous and grossly misleading. The affidavit is set forth at Appendix D, 26a-28a.

We submit that an examination and analysis of the instant affidavit patently discloses that it contains merely

a hodge-podge of baseless conclusions, intermingled with a smattering of isolated facts, uninvolved with the premises sought to be searched and unconstitutionally combined under the formalistic coverall of probable cause. It's validity conflicts with *Bamboy* v. *U.S.*, 24 Fed. (2) 512; *Dixon* v. *U.S.* 334 Fed. (2) 322, P. 323, 324; *Johnson* v. *U.S.*, 113 Fed. Supp. 359, 360; and the Seventh Circuit's own holding in *U.S.* v. *Whitlow*, (7th Cir.), 339 Fed. (2) 975, 978; *Beck* v. *Ohio*, 379 U.S. 89, 13 L. Ed (2) 142, P. 148.

This Court has steadfastly held that the Fourth Amendment right of privacy "should receive a liberal construction." *Gouled* v. *U.S.*, 255 U.S. 298, P. 304; *Go-Bart Lumber Co.* v. *U.S.*, 282 U.S. 344, P. 357; *Weeks* v. *U.S.*, 232 383, 58 L. Ed. 652, P. 655. Likewise this Court has ardently held that search warrants must be strictly construed. *Sgro* v. *U.S.*, 287 U.S. 206, P. 210. And see *Keiningham* v. *U.S.*, 287 Fed. (2) 126, P. 129.

The Court of Appeals relied upon this Court's holding in *Ventresca* v. *U.S.*, 380 U.S. 102, as authority for upholding the validity of the instant affidavit and search warrant. Surely, this Court did not intend in *Ventresca* to obliterate or minimize the necessity of facts to establish probable cause for the issuance of a search warrant. Yet the Court of Appeals' interpretation of this Court's language in *Ventresca* and the Courts quote therefrom in the case at bar has given *Ventresca* just such an erroneous construction. The Court of Appeals' interpretation of *Ventresca* was not only erroneous but It's reliance thereon was likewise misplaced in upholding the validity of the instant affidavit. In *Ventresca*, the agents' nine days surveillances of the premises sought to be searched were set forth in minute factual detail. The affiant-agent particularly set forth and itemized what was seen, by whom it was

seen and when it was seen on the premises, as well as the owner's and visitors' activities on the premises. This Court summarized the minutely detailed facts recited in the *Ventresca* affidavit for the search warrant as follows, 13 L. Ed. (2) 684, P. 686:

> "The affidavit then described seven different occasions between July 28th and August 30th, 1961, when a Pontiac car was driven into the yard to the rear of Ventresca's house. On four occasions the car carried loads of sugar in sixty pound bags; it made two trips loaded with empty tin cans; and once it was merely observed as being heavily laden. Garry, the car's owner, and Incardone, a passenger, were seen on several occasions loading the car at Ventresca's house and later unloading apparently full five gallon cans at Garry's house late in the evening. On August 28th, after a delivery of empty tin cans to Ventresca's house, Garry and Incardone were observed carry from the house cans which appeared to be filled, and placing them in the trunk of Garry's car. The affidavit went on to state that 'at about 4:00 a.m. on August 18th, and at about 4:00 a.m. on August 30th, investigators smelled the odor of fermenting mash as they walked along the sidewalk in front of Ventresca's house. On August 18th, they heard, at or about the same time, . . . August 18th, they heard, at or about the same time, . . . certain metallic noises.' On August 30th, the day before the warrant was applied for, they heard (as they smelled the mash)' sounds similar to that of a motor or a pump coming from the direction of' Ventresca's house."

A comparison between the agents' specific and detailed observations of their surveillances in the *Ventresca* affidavit with the gross absence of such detailed facts of the agents' surveillances in the instant affidavit reveals that the contrast between the affidavits is most startling. The agents' detailed recitations, observations and chronological

surveillances are set forth in the *Ventresca* affidavit. It is the absence of the agents' detailed factual recitations, observations and chronological surveillances of the premises sought to be searched that precludes the instant affidavit from establishing probable cause for the issuance of a search warrant to search the desired premises. The elaborate factual recitations in the *Ventresca* affidavit for the search warrant being the governing standard, it is patently obvious that the meager allegations in the affidavit for the search warrant in the instant cause cannot constitutionally stand.

IV.

THE ADMISSION INTO EVIDENCE OF PETITIONER'S INHERENTLY INVOLUNTARY CONFESSION AND HIS PREVIOUS CRIMINAL RECORD AND THE JUROR'S CONVERSING WITH THE GOVERNMENT WITNESS-AGENT IN THE JUROR'S PRESENCE, WHILE THE WITNESS WAS STILL ON THE STAND, DENIED PETITIONER A FAIR TRIAL AND CONFLICTS WITH THIS COURT'S DECISION.

Agent Hill testified that he and Agent Pringle arrested Petitioner on April 27, 1964, in the New Bonneville Lounge in Chicago. Agent Hill was then asked by the Government attorney, (A. 45-46):

> Q. After that discussion, did you have further discussion?
>
> A. Yes, sir. Agent Pringle asked Phillips if the heroin belonged to him and he said—well, first he denied it, * * * he first said no, then he said he didn't want to see Ruth go to jail. He said it was his stuff."

Defense counsel's objection and motion to strike this testimony were overruled, (A. 46). This confession on its face was inherently involuntary. This confession on its face was motivated and induced by fear. After first denying

ownership, Petitioner confessed that the narcotics were his to prevent Melsia Ruth Delaney, his girl friend, from going to jail and being imprisoned for its possession. A confession so involuntarily obtained and induced is certainly not voluntarily given. In *Haynes* v. *Washington*, 373 U.S. 503, 10 L. Ed. (2) 513, P. 520-521, this court held:

> "In short, *The true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.*" (Italics ours).

In *Lynumn* v. *Illinois*, 372 U.S. 528, 9 L. Ed. (2) 922, the evidence positively established that the defendant made a controlled sale of narcotics to a police informer. She had prerecorded money in her possession when she was arrested shortly after the sale. She confessed having made the sale, contending that she was induced so to do because of her fear that if she didn't confess her children would be taken from her and her public assistance would be denied her. In reversing the judgment of conviction, this Court stated, 9 L. Ed. (2) 922, P. 926:

> "We think it clear that confession made under such circumstances must be deemed not voluntary, but coerced."

Petitioner's confession as related by the testimony of Agent Hill was not the product of a free will, but was induced by fear and compulsion. It should not have been admitted into evidence. It violated his fifth amendment constitutional right against self-incrimination.

Moreover, the sole evidence in the case at bar that Petitioner concealed the drugs found in the apartment was this extra judicial confession. The Government witness, Mrs. Hattie Jackson, the owner of the premises and second floor resident thereof, and the co-defendant-Delaney, testi-

fied that Petitioner had not lived in the apartment for over three months prior to April 24, 1964, the date of the seizure, (A. 57-59, 82).

Agent Pringle testified that he, Agents Hill and LaBree, while seated in their automobile, surveilled the premises 8004 S. Yale in the early morning hours of April 24, 1964. While there, Agent Pringle testified he observed Petitioner drive up, exit his automobile, enter the premises and leave shortly thereafter and that he turned his automobile directly in front of the automobile in which the agents were sitting, at which time the agents slid down, (A. 71). He was asked on cross examination, (A. 73):

"Q. And was it because you didn't want to be seen that you slid down?

A. No, Homer Phillips knew me and I knew him."

This question required no more and no less than a "yes" or a "no" answer. Agent Pringle was trained and experienced, not only as a Federal Narcotic Agent in the field of law investigation and enforcement, but in testifying as a witness as well. He was or should have been well aware that his unresponsive answer was prejudicial and brought before the jury facts and matters the jury was not entitled to hear, to Petitioner's detriment. The agent-Petitioner's acquaintanceship certainly was not social. The agent's unresponsive answer left the jury with the indelible impression that the acquaintanceship was occasioned by the agent's previous encounter with Petitioner in narcotic violations.

Agent Pringle was not the only Government witness who brought Petitioner's criminal past before the jury. Agent Hill testified that when they arrived at the Bureau office, Petitioner told him and Agent Pringle that "he would not sign a statement because he didn't want to go to jail,"

(A. 57). Yet, Agent Pringle's testimony of this same conversation—when he asked Phillips' if he would give him a written statement, Phillips said, "No, I don't want to go *Back to Jail* either," (A. 64). This testimony of Agent Pringle, unequivocally related to the jury that Petitioner had previously been in jail. The posture in which the conversation was related unquestionably informed the jury that Petitioner not only had previously been in jail, but had been there because of a narcotic violation. This testimony denied Petitioner a fair and impartial trial.

The Court struck Agent Pringle's testimony of this conversation. But the harm had been done and the Court's instruction to the jury to disregard this conversation failed to cure it. As Mr. Justice Jackson so aptly stated in *Krulewitch* v. *U.S.*, 336 U.S. 440, 93 L. Ed. 790, P. 799:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

Immediately after Agent Pringle had testified that Petitioner told him that he did not want to go back to jail, and the trial court instructed the jury to disregard this portion of Agent Pringle's testimony, the trial court declared a recess and left the bench, (A. 64). Agent Pringle remained seated in the witness box. The jury was excused from the jury box and proceeded to retire to the juryroom. As the jury passed the witness box, one of the jurors, in the presence of the other jurors, said to Agent Pringle You'd better watch that" or "You'd better watch that stuff," (A. 66-67), apparently referring to Agent Pringle's "back to jail testimony." This juror's cordial fraternization with the Government-narcotic agent witness in the other jurors' presence was highly prejudicial to Petitioner. It created an atmosphere and attitude of admiration for the Govern-

ment witness and hostility against Petitioner in the minds of the jurors. Petitioner could not overcome it in spite of the dismissal of the conversant juror, (A. 69). It is respectfully submitted that the Court should have granted Petitioner's motion for a mis-trial, as the trial court granted the Government's motion for a mis-trial in *Simmons* v. *U.S.*, 142 U.S. 143, P. 153-154, 35 L. Ed. 968, P. 971, because of the mere accusation, and no evidence, of acquaintanceship between the defendant and a juror from an unidentified source, which acquaintanceship was denied by both the defendant and the juror, and in *Thompson* v. *U.S.*, 155 U.S. 271, 39 L. Ed. 146, in which the trial court's granting of a motion for a mistrial, because one of the petit jurors had served on the grand jury which returned the indictment against the defendant, was sustained, even though it was not revealed that this juror heard the grand jury evidence or voted for the indictment's return.

Petitioner was denied his constitutional rights to "equal protection of the laws" and "due process of law." The trial court applied one legal principle in granting Defendant-Delaney a new trial. If refused to apply the same principle to Petitioner's motion for a new trial and denied it. The drugs were found in Delaney's apartment and in her presence. The jury found her guilty. Petitioner had not lived there during the three months prior to the drugs' discovery and he was not present when the drugs were discovered. The only evidence of Petitioner's concealment of the drugs was his before-mentioned extrajudicial involuntary confession. The jury found him guilty also.

When asked by the trial court on what point he relied for a new trial, Delaney's counsel answered, "That the weight of the evidence was manifestly not in acord with the verdict. * * * My client wasn't guilty of the charges."

(A. 103). The jury found otherwise. The Court responded, however, (A. 103):

> "The Court: I don't know whether she was or not but it is very difficult for me to feel the certainty with which the jury could have seen the knowledge on her part just from the fact that an agent picks up a telephone book and then she turns around and he says, 'I found this in the telephone book' * * * I don't believe that the jury had a clear basis upon which to find against her and I am going to allow her a new trial on your motion. * * * I will proceed with sentencing as to Homer Phillips at this time."

The Court sentenced Phillips to ten years imprisonment. It is clear that the trial court did not apply the same principle to the two defendants. Had it done so, it would have likewise granted Petitioner's motion for a new trial, or, perhaps more properly, on the Court's stated basis, his motion for judgment of acquittal.

CONCLUSION

The instant judgment and sentence does not measure up to that standard of criminal prosecution expected and required in the Federal courts of the United States of America. We pray that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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